United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

254

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1059
Criminal No. 717-70

Gary E. Caldwell, Appellant

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from Judgment of Conviction in the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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May 28, 1971

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INTRODUCTORY NOTE REGARDING TRANSCRIPT REFERENCES

References in this brief to the transcript of the trial held on July 13 and 14, 1970, shall be as follows: Tr. (page).

References to the transcript of the oral argument and ruling on appellant's Motion For A Lineup, held on July 7, 1970, shall be as follows: Motion For A Lineup, Tr. (page).

References to the transcript of the Pretrial Hearing held on May 26, 1970, shall be as follows: Pretrial Hearing, Tr. (page).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in permitting the daughter, Mrs. Millard, to give an in-court identification of the appellant after the prior illegally suggestive "one man show-up" when, two months after the crime, she was asked by the police to identify appellant as the robber while appellant was under armed police guard, in handcuffs, and she knew her own mother (who was present) had previously identified appellant as the robber.

2. Whether the District Court erred in failing in the circumstances of this case, to grant appellant's pretrial Motion For A Lineup, in which appellant requested that the two complaining witnesses who had not attended a lineup be permitted to attend one so the Court could have a more objective idea as to whether the complaining witnesses could identify him as the alleged robber.

3. Whether, in the circumstances of this case, either of the foregoing errors was so "harmless" that appellant's convictions should not be reversed.

This case has not previously been before this Court.

REFERENCE TO PARTIES AND RULINGS

The Court's attention is respectfully directed to:

(1) The oral ruling of United States District Judge Howard F. Corcoran's pre-trial ruling of July 7, 1970, after oral argument, denying appellant's Motion For A Lineup (July 7, 1970, Tr. 7-8);

(2) The oral ruling of the same judge, on July 13, 1970, during the trial, after a Wade-Gilbert-Stovall type hearing, that Mrs. Paullette Yvonne Millard would be permitted to make an in-court identification of appellant as the alleged robber despite the "overly-suggestive" one-man show-up held two months after the robbery (Tr. 65-67); and

(3) The oral ruling of the same judge at the Pretrial Hearing of May 26, 1970, denying appellant's motion that the trials on each of the two counts of the indictment be severed.

The grounds for none of these rulings were set forth in writing.

There are no other parties to this litigation.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below

On March 18, 1970, the appellant, a steadily-employed 24 year-old black auto mechanic with no prior criminal record, was in the laundromat washing his work clothes with soap powder just purchased next door at a High's store, when he was arrested for allegedly robbing that High's store the previous January 22 and February 2 of about $30 and $25 respectively. He was arrested in the laundromat on the identification by Mrs. Mary Ann Body, a witness to one of the two robberies, and taken by the police, under armed guard and in handcuffs, to the rear of the adjacent High's store where he was identified in a "one-man show-up" by Mrs. Body's daughter, a witness to the other robbery, who knew that her mother had identified appellant as the robber and that he had been arrested by the police for the crime.

Appellant was subsequently taken to the police station and booked. Six days later, on March 24, 1970, at a formal lineup, the only witness to both robberies and the person closest to the robber at both robberies, Mrs. Sarah Ethridge, failed to identify appellant as the robber. No other witness or potential witness attended the lineup.

On April 28, 1970, the Grand Jury indicted appellant on two counts of robbery in violation of Section 22-2901 of the District of Columbia Code.

On May 6, 1970, a Pretrial Hearing was held in the District Court. An oral motion for a severance of trial on the two counts was made and was denied by the Court (Pretrial Hearing, Tr. 1-3).

On July 6, 1970, appellant filed Motion For A Lineup, requesting that the complaining witness* be permitted to make an identification of the appellant in a lineup, so as to "cure" any questions about the adequacy of the identification and the ability of the complaining witnesses to identify appellant as the robber. This Motion was opposed by the Government. After oral argument before the District Court on July 7, 1970, the Motion was denied, and exception taken (Motion For a Lineup, Tr. 7-8).

At the trial, held on July 13-14, 1970, a Wade-Gilbert-Stovall hearing was held outside the presence of the jury. The District Court concluded that the identification by the daughter, Mrs. Millard, when appellant was in handcuffs in the rear of the High's store after his

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* At first, appellant's counsel below understood that there was only one complaining witness. By the time of the oral argument on the Motion, he had learned there might be two (Motion For A Lineup, Tr. 4).

identification by her mother and his arrest, was the result of an "overly suggestive" one-man show-up (Tr. 65), and that the daughter, Mrs. Millard, would not be permitted to testify as to her out-of-court identification. However, the Court denied appellant's request that Mrs. Millard be barred from identifying appellant in court (Tr. 64-67).

At the trial, both Mrs. Millard and her mother, Mrs. Body, identified appellant as the robber* and the jury returned a verdict of guilty on both counts. On January 6, 1971, appellant was sentenced to a prison term of six months to five years on each count, the sentences to run concurrently.

B. The Relevant Facts

Other than the identification testimony, there was no evidence connecting appellant with the crimes, which he steadfastly denied at the time of his arrest, in his testimony at the trial and at all other times. The only evidence allegedly connecting appellant with the crime was the testimony of two High's store employees, mother and daughter, the daughter having witnessed the first robbery and the mother having witnessed the second. Another store employee, who was the only witness who was present at both robberies, failed to identify appellant as the robber either at a lineup or in court. Neither the mother nor the daughter viewed a lineup. These were the only

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* Appellant testified in his own defense; there were other witnesses for both the prosecution and the defense.

witnesses to the crimes who testified, and were all presented by the Government. The following Statement of the Case is based on their testimony and that of the arresting officers except where expressly stated otherwise.

During the evenings of January 22, 1970, and February 2, 1970, a man wearing a green army jacket with a hood attached to it, robbed the High's store at 1548 First Street, S. W., Washington, D. C. On both occasions, the hood, which was an integral part of the jacket, was tied so that his entire face was visible. He wore no mask. He had a hand in his pocket as if he had a gun, although no weapon was ever exhibited. He asked a store employee for the money and was given it from the cash register, about $30 on the first occasion and about $25 on the second. He then left. The store was well-lit on each occasion and the robberies each took several minutes (Tr. 6-9, 12-15, 29-31, 37, 74-77, 78-79, 95-97, 114-116, 117-120, 121).

Mrs. Sarah Ethridge, a High's employee, was present on both occasions. On both occasions she was the one who gave the money to the robber, so that on each occasion she was closer to him than anyone else (Tr. 107, 115, 127). She testified she had never seen the robber in the store before, although she had worked there for

two years before the robbery (Tr. 120, 122).*

Six days after appellant's arrest, Mrs. Ethridge attended a lineup at which appellant was present, but she failed to identify appellant as the robber (Tr. 123, 127, 143-144). At the trial, Mrs. Ethridge was neither asked to identify appellant as the robber nor did she do so. She did testify that the same person committed both robberies (Tr. 121).

Mrs. Mary Ann Body, and her daughter, Mrs. Paullette Yvonne Millard, were also High's employees. Mrs. Millard witnessed only the first robbery and Mrs. Body witnessed only the second. They were the only witnesses who identified appellant as the robber, and they came to make their identifications in the following manner:

Sometime after the two robberies occurred, the police "staked out" the store with police officers in the guise of employees (Tr. 101, 131, 133, 135, 137). On the evening of March 18, 1970,

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*Significantly, Mrs. Body, the manager of the store and who worked there most of the time, also testified that she had never seen the robber before (Tr. 36, 105, 109, 112). But Mrs. Millard and appellant testified that appellant had been a customer in the store on a number of occasions prior to the robbery, even though Mrs. Millard never told the police that the robber had been a customer (Tr. 22-23, 81, 83-84, 112, 177-178, 194-195).

from six to eight weeks after the robberies, appellant, who lived in the neighborhood, came into the store to buy some soap powder. He had no disguise or face covering. He purchased the soap powder from Mrs. Body, who was on duty at the time (Tr. 32, 101-102). When he was leaving the store, Mrs. Body turned to Police Officer Elizabeth Ann Hines, who was dressed as a store employee (Tr. 131), and "tried to point out to her that [appellant] was the one who robbed [me]" (Tr. 32, 102). Apparently no effective pursuit was made, although appellant went only next door to the laundromat to wash his work clothes in the machine with the soap powder he had bought (Tr. 46, 138-139 and appellant's testimony, Tr. 180-181).

A little while later, appellant, not satisfied that his clothes were properly clean after the first washing,* returned to the High's store to purchase another packet of soap powder. Appellan approached the counter, where Officer Andrew J. Micklus, in plain clothes and looking like a customer, was talking with Officer Hines, in the garb of a store employee. Appellant politely inquired as to whether Officer Micklus (who he did not realize was a police

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* Appellant was an auto mechanic and his clothes were, in his opinio still greasy (appellant's testimony, Tr. 180).

officer) was in line, and on being told he was not, went in front of him, purchased the soap powder and left the store (Tr. 32, 45, 102-104, 136). It is clear that appellant had no inkling of danger or suspicion, because for the second time that night he went next door to the laundromat and started the machine to wash his clothes (Tr. 45-46, 138-139 and appellant's testimony, Tr. 180-181).

Meanwhile, the second time appellant was in the store that evening Mrs. Body again pointed out appellant to Officer Hines as the one who had robbed her (Tr. 32, 45, 102-104, 132). Officer Hines relayed that opinion to Officer Micklus who got Officer Clinton who was in plain clothes in a car across the street, and the officers went into the laundromat, the last two armed with a shotgun and a service revolver, and arrested appellant. Officer Hines went back to the High's store and got Mrs. Body, who, in the laundromat, again identified appellant as the robber (Tr. 32, 38-39, 45-46, 49-51, 54, 103-104, 132-133, 136-139).

Sometime during this period in the laundromat, appellant was handcuffed. He was also searched and no weapons found. Although the arresting officers had a car at the shopping center and there was no need to take appellant back to the High's store, they took appellant back to the High's store, where he was taken under armed guard into the rear room, in handcuffs (Tr. 19-20, 39-40, 47, 50-51, 139, 197-198).

Mrs. Body's daughter, Mrs. Millard, was also working in that High's store that night, and had been out on her "dinner break" during the foregoing events (Tr. 9, 17, 19). She returned after the officers had left the High's store to arrest the appellant at the laundromat next door. Meanwhile, Officer Hines returned to get her mother to go to the laundromat to identify appellant (Tr. 9, 17, 32, 38, 202-203). Before her mother left with Officer Hines, Mrs. Millard was told by her mother that the man who robbed them was next door in the laundromat washing (Tr. 9, 18, 19). A few moments later, the officers and her mother returned to High's, bringing in appellant in handcuffs, and took him to the rear of the store. The officer then asked the daughter, Mrs. Millard, if she was able to identify appellant as the robber, and she identified him (Tr. 9, 18-20, 39, 53-54).

By coincidence, while the identification by Mrs. Millard was being made, appellant's brother, Melvin Caldwell, who lived in the same house as appellant (which was in the neighborhood) came into the store to make a purchase. Mrs. Body noted the resemblance between appellant and his brother, and told Officer Micklus that she wasn't sure that it was appellant who had robbed her. Officer Micklus told her that "she better be certain or the man would not be held as the guilty party" (Tr. 200), whereupon she examined appellant more closely, noticed the small scar under his

eye, and confirmed her identification of appellant (Tr. 40-41, 109-110, 200-201, 206-208). Thereafter, appellant was transported to police headquarters and booked.

Two additional facts are also significant:

(1) The daughter, Mrs. Millard, testified at the trial that prior to the robbery she knew appellant as a customer in the store (Tr. 22-23, 81, 83). She knew that appellant had shopped there on many occasions before the robbery (Tr. 83-84).* Yet, at the time the police investigated the robbery, she never mentioned to the police that she recognized the robber as a customer or as someone from the neighborhood (Tr. 22-23, 81, 83-84).**

(2) The mother, Mrs. Body, testified that at the time of the robbery, she did not recognize the robber as someone who had

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* She also knew appellant well enough to tell the officers, at the time they arrested appellant, that appellant's "brother looks just like him but doesn't have the scar under his eye" (Tr. 20).

** It should also be noted that Mrs. Ethridge described the robber as having a cut "on the right eyelid" (Tr. 116) or "on his right eye" (Tr. 117, 124); Mrs. Millard described the robber as having a small scar "under the left eye" (Tr.16), "on his eyelid" (Tr. 16), and "underneath his right eye" (Tr. 79); and Mrs. Body described the robber as having a cut or scar "under his right eye" (Tr. 31, 98).

been a customer of the store (Tr. 36, 105, 109, 112), and that the only time she saw appellant after the robbery was when she identified him to Officer Hines the night appellant was arrested.* Yet, Mrs. Body twice testified that when appellant's brother, Melvin Caldwell, by coincidence came into the store as a customer while appellant was being held in the rear of the store, she herself said "That's his brother" (Tr. 206, 208, emphasis supplied).

Mrs. Sarah Ethridge, the only employee who was on duty at the time of both robberies, and who gave the money to the robber and therefore was the closest to him on each occasion (Tr. 127), was not in the High's store on the night of the arrest. Although she had worked in the store for two years prior to the robbery, she had never seen the robber in the store before the robbery (Tr. 120, 122).

Six days after the arrest, Mrs. Ethridge attended a lineup where appellant was present and failed to identify him as the robber (Tr. 123, 127, 143-144). However, she did testify that it was

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* Mrs. Body also testified that as manager of the store, she worked in the store seven days a week, opening and closing it most of the time, and that she remembered the faces of regular customers. Both her daughter and appellant testified that appellant had been a customer of the store on a number of occasions (Tr. 22-23, 81, 84, 112, 177-178, 194-195).

Mrs. Ethridge testified that she had never seen the robber before the robberies, although she had worked in the store for two years prior to the robberies (Tr. 120-122).

the same person who had robbed the store on both occasions (Tr. 118, 120).

Neither Mrs. Body nor Mrs. Millard ever attended any lineups (Tr. 23, 41, 143).

In a conscientious effort to reduce any question about the adequacy of the identification by Mrs. Body and Mrs. Millard, appellant made a pre-trial Motion For A Lineup (Motion For A Lineup, filed July 6, 1970), requesting that these two witnesses be permitted to view appellant at a formal lineup. The Government opposed the motion, and it was denied by the District Court (Motion For A Lineup, Tr. 1-7).

At the trial,presided over by the same judge that ruled on the Motion For A Lineup, the Court held a Wade-Gilbert-Stovall type hearing out of the presence of the jury (Tr. 5-67), at which Mrs. Millard, Mrs. Body, Officer Micklus and the appellant testified. The Court ruled that the identification the daughter, Mrs. Millard, made of appellant on March 18 in the rear of the High's store "when he was brought in and handcuffed...in the company of a couple policemen and being prodded by the mother, I think that is probably somewhat over-suggestive" (Tr. 65,66). However, he ruled only that he would exclude testimony by the daughter, Mrs. Millard, concerning her pretrial identification in the rear of the High's store, and

denied appellant's request that her in-court identification be excluded as having been based so extensively on the illegal confrontation (Tr. 64-65).

At the trial, Mrs. Millard, the daughter, was the only witness who identified appellant as the person who committed the robbery of January 22. Mrs. Body, the mother, was the only witness who identified appellant as the person who committed the robbery of February 2. Mrs. Ethridge, who was the only other witness present at both robberies, and with the closest opportunity to view the robber, failed to identify appellant as the robber, although she testified that it was the same person who committed both robberies. There was no other evidence presented at the trial to connect appellant with the robberies, other than the identification testimony of the witnesses.

Appellant has at all times denied committing either robbery (Tr. 188-189).* His uncontested testimony, or testimony of witnesses presented by him, showed that he is an auto mechanic who earned from about $100 to $250 per week (Tr. 167, 176-177); that he had been

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* See also Pretrial Conference, Tr. 2

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* See also Pretrial Conference, Tr. 2

working regularly as an auto machanic since 1959 or 1960 except during the period he was in the Navy (Tr. 164-167, 171); that he had an excellent reputation for truth, honesty and veracity (Tr. 168-169, 172-173); that he lived a few blocks from the High's store and had patronized it from time to time, particularly to buy soap powder when he washed his work clothes next door at the laundromat (Tr. 177-178); that at the time of the robbery he lived alone* in an apartment in the same building where his mother and brother lived in a separate apartment (Tr. 150, 189-190); and that he owned an army-type jacket and while at first glance it looked like the robber's, the complaining witnesses agreed that it was not the one worn by the robber (Tr. 89-90 (testimony of Mrs. Millard); 108 (testimony of Mrs. Body); 123-124 (testimony of Mrs. Ethridge); 150-151, 180, 183).

Appellant did not offer any specific statement of his activities on the nights of the robberies, testifying that he had no idea where he was on those specific nights because nothing happened that would cause him to remember them (Tr. 178-179). His pattern of behavior during this period (prior to his marriage) was to work

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* Appellant was engaged at that time; he has since that time married and become the father of a girl (Tr. 188).

late, go home, eat dinner and go to bed, except for seeing his fiancee once or twice a week (she was going to school) and on weekends (Tr. 188, 189, 193-194).

SUMMARY OF ARGUMENT

1. This case presents a unique combination of circumstances which plainly establish that there was an overly-suggestive "one-man show-up," in violation of appellant's rights under the Fifth and Sixth Amendments. It is also clear that the taint caused by his confrontation was such that the identification of appellant by a key witness should not have been permitted. Failure by the Court below to exclude that in-court identification, after being requested to do so by appellant, requires reversal of the convictions.

The only evidence that appellant was the person who robbed the High's store were the oral identifications by Mrs. Body, the mother, as to the second robbery, and by Mrs. Millard, the daughter, as to the first robbery. The only other eyewitness, Mrs. Ethridge, who was the only person present at both robberies and who was closest to the robber at both, failed to identify appellant as the robber at a lineup or at the trial. Neither Mrs. Body nor Mrs. Millard ever attended a lineup.

The undisputed evidence was that almost two months after the first robbery and six weeks after the second, appellant was identified by Mrs. Body, the mother, as the robber and arrested in a laundromat. However, he was not removed to police headquarters but instead was brought back to High's under armed police guard, in

handcuffs, where he was shown to Mrs. Millard, the daughter, who was told that her own mother (who was present) had already identified appellant as the robber. The police then asked Mrs. Millard to identify appellant as the robber.

These events occurred two months after the robbery witnessed by Mrs. Millard, and her mental picture of the robber was no longer fresh. Furthermore, it is unlikely she ever had appellant in mind as the robber since she testified that she knew appellant as a customer prior to the robbery, but she never told the police after the robbery that the robber was a customer or that she knew him, although the robber wore no facial disguise or mask.*

There are in this case none of the factors the Courts had deemed significant so as to permit in-court identifications after a prior suggestive confrontation. The daughter did not accurately describe the appellant to the police; the suggestive confrontation did not occur while her memory of the crime was fresh; the identification necessary for purposes of making the arrest had

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* The two robberies were committed by an unmasked, undisguised robber. It is inherently incredible that a person like appellant, who lived in the neighborhood and was a customer of the store, and therefore readily identifiable, would have committed them, let alone that he would have continued to be a customer of the store.

already been made by her mother and there was no valid purpose for the confrontation; there was no requirement of urgency in the confrontation; her own mother "prodded" her into making the identification; she was presented only with appellant, and no others, while appellant was under armed guard and in handcuffs; and she had made no prior identification of appellant either in person or by photograph.

Clearly, under the factors the Courts have indicated to be significant, the illegally suggestive confrontation was not "purged of the primary taint" so as to permit the daughter to make the subsequent in-court identification.

2. In order to reduce the taint of the prior suggestive confrontation, the appellant affirmatively requested the District Court to order a pretrial lineup so that the District Court could have some more objective idea of whether the complaining witnesses who had not attended a prior lineup (at which the only witness to both robberies had failed to identify appellant as the robber) could identify him as the robber.

This Motion was opposed by the Government and denied by the District Court. In the circumstances of this case, that denial deprived appellant of a fair trial under due process of law by increasing the hazards of eyewitness identification and consigning

him simply to challenging, in a pretrial hearing, the admission of the identification testimony into evidence.

3. Each of the errors made by the District Court was material to the resulting conviction of appellant on both counts of robbery. There is no question that the testimony of the daughter was very material to conviction of the first robbery, to which she was the only eye-witness who identified appellant as the robber.

As to the second robbery, her testimony was also material because the Government used her testimony, together with Mrs. Ethridge's testimony that the same person committed both crimes, to support its contention that appellant was the robber. Without Mrs. Millard's testimony, the jury would have had one witness (Mrs. Body) who identified appellant as the robber, and one witness (Mrs. Ethridge) who did not identify appellant though she saw the robber twice from a point closer than anyone else. Mrs. Millard's testimony clearly was material, and was used by the Government in its closing argument to convince the jury of appellant's guilt of both robberies. At the very least, the admission of Mrs. Millard's testimony was not "harmless error."

TRANSCRIPT REFERENCES FOR ARGUMENT I

The Court's attention is respectfully directed to the following pages of the transcript:

Tr. 5-67

Tr. 81-84

Tr. 89-127

Tr. 130-141

Tr. 143-144

Tr. 177-183

Tr. 194-203

Tr. 205-208

I. BECAUSE OF THE OVERLY-SUGGESTIVE AND UNJUSTIFIED PRETRIAL "ONE MAN SHOW-UP," THE IN-COURT IDENTIFICATION OF APPELLANT BY MRS. MILLARD, THE DAUGHTER, SHOULD HAVE BEEN EXCLUDED.

A. The Pretrial Identification By Mrs. Millard Was Violative Of Appellant's Rights.

It is hard to conceive of a more suggestive and less justified pretrial confrontation in which an alleged perpetrator of a crime is displayed to his alleged victim for identification, than the one involved in this case.

The evidence presented by the Government, which is in its material points undisputed, clearly showed that after appellant was identified by Mrs. Body in the laundromat next door, he was arrested there. Instead of removing him directly to police headquarters, however, appellant was brought back to High's handcuffed and in the custody of three police officers; the daughter, Mrs. Millard, was informed that this was the man her own mother had just identified as the robber and whom the police, holding guns (including a shotgun), had arrested; and she, too, was then asked by the police officers to identify him under these clearly overly-suggestive conditions.

Of course, appellant was deprived of his right to counsel under the Sixth Amendment at this significant confrontation with a material witness. United States v. Wade, 388 U.S. 218, 87 S.Ct.

1926 (1967); Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951 (1967); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. den. 394 U.S. 964 (1969); Long v. United States, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969); Mason v. United States, 134 U.S. App. D.C. 280, 414 F.2d 1176 (1969).

There can also be no doubt whatsoever that this pretrial identification by Mrs. Millard was held under illegally suggestive circumstances, in violation of appellant's rights to due process under the Fifth Amendment. As the Supreme Court said in United States v. Wade, 388 U.S. 218, 234, 87 S.Ct. 1926, 1934 (1967):

> "And the vice of suggestion created by the identification in Stovall, supra, was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31-32."

Not only was appellant alone in the custody of the police, handcuffed and guarded with guns, but Mrs. Millard was told that appellant had already been positively identified as the robber by another witness, and that other witness was her own mother who was present at the time!

This Court has on a number of occasions ruled that witnesses should view lineups separately, so that one witness's conclusion as to identity shall not affect the others. For example, in United States

v. Allen, 133 U.S. App. D.C. 84, 86-87, 408 F.2d 1287, 1289-90 (1969), this Court said:

> "A second problem posed by the multi-witness lineup is the increased potential for inter-witness communication which is unfairly suggestive. The Government thus might do well to consider methods of separating witnesses to prevent communication between witnesses or the identification of suspects by one witness in the presence of other witnesses. The promulgation of carefully written and well-enforced regulations which instruct both witnesses and the police as to appropriate conduct during the lineup would certainly be a helpful step in the right direction."

But here the vice is even greater. Here, the witness's own mother, who was also the manager of the store where the witness was employed, was the one who had made the prior identification of appellant and who was present at the confrontation, "prodding" her daughter also to identify appellant as the robber (Tr. 66).

Clearly, the confrontation was violative of virtually every aspect of due process and right to counsel.

B. The Improper Confrontation Fatally Tainted Mrs. Millard's In-Court Identification.

The next question is whether the improper confrontation so fatally tainted Mrs. Millard's in-court identification that her testimony identifying appellant as the robber should have been excluded, as well as her pretrial identification.

As the Supreme Court recognized in United States v. Wade, supra,

where the question involved a lineup:

> "A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself--realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification....
>
> "We think it follows that the proper test to be applied in these situations is that quoted in Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, '[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959).' See also Hoffa v. United States, 385 U.S. 293, 309, 87 S.Ct. 408, 17 L.Ed. 2d 374. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the

> alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup" (388 U.S. at 240-241, 87 S.Ct. at 1939-40).

See also Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968).

In reviewing the decisions of the Courts as to the "various factors" of identification procedures which will be deemed to constitute the "various factors" to be considered "exploitation of that illegality" or to "purge the primary taint," it is clear that none of them would permit the in-court identification admitted in this case. Consider the following factors:

(1) A number of cases* permitting an in-court identification stress the fact that the witness had a good opportunity to view the criminal at the time of the crime and in fact gave a clear and accurate description of him to the police before any suggestive identification

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* Simmons v. United States, supra; Hawkins v. United States, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969); Clemons v. United States, 133 U.S. App. D.C. 27, 408 U.S. 1230 (1968); United States v. Wilson, ____U.S. App. D.C.____, 435 F.2d 403 (1970); United States v. Miller, No. 22, 332, decided by this Court March 19, 1971; United States v. Washington, No. 23, 059, decided by this Court December 28, 1970; Gregory v. United States, No. 21,089, decided by this Court March 18, 1969.

was made. This shows that the witness had a clear picture of the criminal in his mind before the suggestive confrontation, which pre-existing mental picture can be considered as continuing until the trial, independent of the suggestive confrontation. However, here Mrs. Millard testified that she knew appellant as a customer prior to the robbery, and yet, when she described the robber to the police after the robbery, she did not tell them that very critical fact. (She was also confused as to which eye had the scar.) In these circumstances, it cannot be said that she had a sufficiently accurate prior mental picture of what the robber looked like to enable her memory to transcend the illegally suggestive confrontation.*

(2) A number of cases** permitting an in-court identification

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* The two robberies were committed by an unmasked, undisguised robber. It is inherently incredible that a person like appellant, who lived in the neighborhood and was a customer of the store, and therefore readily identifiable, would have committed them, let alone that he would have continued to be a customer of the store.

** Simmons v. United States, supra (a day later); United States v. Wilson, ____U.S. App. D.C.____, 435 F.2d 403 (1970) (ten minutes later); Hawkins v. United States, 137 U.S.App. D.C. 103, 420 F.2d 1306 (1969) (two days later); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. den. 394 U.S. 964 (1969) (the next morning after crime); Russell v. United States, 127 App. D.C. 279, 383 F.2d 206, cert. den. 390 U.S. 964 (1968) (a few minutes later); Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), cert. den. 390 U.S. 964 (1968) (a few minutes later); United States v. Washington, No. 23,059, decided by this Court December 28, 1970 (less than 15 minutes after crime); United States v. Harris, No. 23254, decided by this Court November 27, 1970. (a few hours later).

stress the fact that the suggestive identifications were made by witnesses soon after the crime occurred "while their memories were still fresh," and their minds would be less likely to be affected by suggestion than they would some time later when their memories of the criminal might be less clear. However, here, the suggestive confrontation was two months after the crime, when memories had clearly faded. (See Clemons v. United States, 133 U.S. App. D.C. 27, 46-47, 408 F.2d 1230, 1249-50 (1968), cert. den. 394 U.S. 964 (1969), where a suggestive confrontation more than two months after the crime was permitted only because of a prior photographic identification of the defendant immediately after the crime; see also Gregory v. United States, No. 21,089, decided by this Court March 18, 1969, where three weeks was held to be too long for recollections to remain fresh so as to withstand a suggestive confrontation. It might also be noted that not only was Mrs. Millard's recollection not fresh, but also that her mother was confused even by the chance appearance at the time of arrest by appellant's brother who resembled him.)

(3) A number of cases* permitting in-court identification

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* United States v. Evans, No. 23046, decided by this Court January 7, 1971; see also cases cited in footnote ** page 28 supra.

stress the fact that the suggestive identification was made in order to make sure that the person the police have picked up after some chase is the person they were directed to pick up rather than someone else; under such circumstances, rather than hold some innocent bystander until a lineup can be arranged, the person who spotted the alleged criminal is permitted to make an on-scene identification. However, the kind of identification permitted by such cases is the kind made in this case by Mrs. Body, who went next door to the laundromat to identify the appellant after he had left the High's store. Once Mrs. Body had made that identification and the appellant had been arrested in the laundromat, there was no need to exhibit appellant to other potential witnesses under such unusually suggestive circumstances. Furthermore, in the Evans and Green* cases, the person making the identification did so within two weeks of the offense, by a witness in whom the Court in Evans found "recollection of the offense is still exceedingly fresh" (slip opinion, p. 8). As Officer Micklus admitted here, there was really no need to take appellant back to the High's store once he had been identified by Mr. Body and arrested in the laundromat (compare United States v. Evans, supra).

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* United States v. Green, _____U.S. App. D.C._____, 436 F.2d 290 (1970).

(4) Some cases* permitting an in-court identification stress the fact that there was some element of urgency in the confrontation, such as where it is thought the witness or alleged criminal may die before a proper identification may be arranged. Here, obviously, no such problem existed.

(5) A number of cases** permitting in-court identification stress the fact that the suggestive identification occurred when the witness was alone, and therefore the suggestion was not a significant one (for example, note the concern this Court expressed in United States v. Wilson, _____U.S. App. D.C._____,435 F.2d 403 (1970) because the two victims of the crime were permitted to view the alleged assailant together). Here, of course, it is difficult to imagine a more significantly suggestive confrontation than a daughter presented by armed policemen with a handcuffed man, and being told by her own

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* Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); See also Mason v. United States, 134 U.S. App. D.C. 280, 282, 414 F.2d 1176, 1178 (1969). (Court stated that "where time is not a factor, however, we were mindful of the [Supreme] Court's expressed inability to find any 'substantial countervailing policy considerations *** against the requirement of the presence of counsel'."

** Simmons v. United States, supra; Gregory v. United States, No. 21,089, decided by this Court March 18, 1969.

mother that her mother had identified the man as the robber.

(6) A number of cases* permitting in-court identification stress the fact that the witness saw a number of photographs or people in a lineup before or at the time of the suggestive identification and rejected them, or that others were present at the time and no one was specifically identified as the criminal albeit the situation did not avoid all aspects of suggestibility. The rationale for this is that although the particular identification may have "fallen short of the ideal," the witnesses showed some degree of independence of suggestion. However, here Mrs. Millard was presented only with appellant, under the most suggestive circumstances, had no opportunity to choose among several, and no such argument can be made.

(7) Some cases** permitting in-court identification, stress

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* Simmons v. United States, supra (6 group photographs of defendant and others); Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999 (1970) (six people in lineup); Long v. United States, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969) (witness who identified him among hundreds of people in court building could testify; witness who saw him alone should have had his in-court identification excluded, ruled this Court).

** Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. den. 394 U.S. 964 (1968) (witness Aggrey); Frazier v. v. United States, 136 U.S. App. D.C. 180, 419 F.2d 1161 (1969).

the fact that the witness identified a photograph of the defendant from among many photographs before the suggestive personal confrontation. This prior ability to identify a photograph of the defendant in a non-suggestive identification prior to the suggestive confrontation indicates the witness' ability, without suggestion, to identify the defendant as the criminal. However, in this case, there was no such prior photographic identification (see Clemons v. United States, supra (witness Packer)). Indeed, Mrs. Millard never even told the police she had seen the robber before, although she knew appellant as a customer before the robbery.

But more important than any single one of these factors is their combination. No case permitting in-court identification after a pretrial suggestive confrontation has based its conclusion on the presence of just one of these factors; they have all required a number of them (or other factors also absent here) to be present. However, here there is an amazing absence of the necessary factors to indicate that Mrs. Millard's in-court identification had become "purged of the primary taint" of the prior illegally suggestive confrontation. That in-court identification should have been excluded from the testimony at the trial, and this Court should reverse the conviction herein for failure of the District Court to do so.

TRANSCRIPT REFERENCES FOR ARGUMENT II

The Court's attention is respectfully directed to the following pages of the transcript:

Motion For A Lineup, Tr. 2-8

Tr. 23

Tr. 41

Tr. 123

Tr. 127

Tr. 143-144

In addition, the transcript references for Argument I are also relevant to Argument II as they indicate the circumstances constituting the background against which the Motion For A Lineup was made.

See also the Motion For A Lineup itself, filed with the Clerk of the District Court July 6, 1970.

II. THE APPELLANT'S PRETRIAL MOTION FOR A LINEUP SHOULD HAVE BEEN GRANTED

Appellant did not attempt below merely to rely on any "legal technicality" concerning the illegally suggestive identification. He did not sit back, as many defendants who perhaps are less confident of their innocence might do, and only attempt to dispute the identification, or its introduction, at the trial. He did not even oppose any attempt by the Government to force him to appear at a lineup in the Government's hope of reducing the taint of the prior suggestive confrontation.

On the contrary, appellant himself affirmatively requested the District Court to order another pretrial lineup so that, even at that late date and with all the suggestibility that had previously been involved, the Court could have some more objective idea of whether the two complaining witnesses could identify him as the robber.

Instead of welcoming the opportunity for a lineup to prove the ability of the two complaining witnesses to identify appellant,* the Government opposed it. Instead of granting the motion, the District Court denied it. The theory apparently followed by the Court below

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* E.g., see Adams v. United States, 130 U.S. App. D.C. 203, 399 F.2d 574 (1968), cert. den. 393 U.S. 1067 (1969); United States v. Allen, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969); and Williams v. United States, 136 U.S. App. D.C. 158, 419 F.2d 740 (1969).

was that the Wade-Gilbert-Stovall hearing was adequate protection in these circumstances (Motion For A Lineup, Tr. 6-7).

The only witness who did view appellant at a proper lineup, Mrs. Sarah Ethridge, failed to identify appellant as the robber, even though she was closer to the robber during both robberies than either Mrs. Body and Mrs. Millard and even though she was the only person who saw the robber on both occasions (Mrs. Body and Mrs. Millard each having been present on a different occasion). One would think her knowledge and memory of the robber would be more accurate and clearer than the others. Yet, the Government thought it proper that she test her memory in the crucible of a lineup.

Why not Mrs. Body and Mrs. Millard? Why did the Government never ask them to attend a lineup? Why did the Government oppose appellant's request that they attend a lineup? Was the Government so concerned that they, too, might fail to identify appellant that it preferred not to take any chance? What other valid explanation can there be for such a refusal to give appellant his only chance, however slim it was, to test their memories even in the face of their prior confrontation of the appellant?

The Supreme Court has said that the right of cross-examination at the trial is not

> "an absolute assurance of accuracy and reliability.... the first line of defense must be the prevention of

> unfairness and the lessening of the hazards of eyewitness identification...." (United States v. Wade, supra, 388 U.S. at 235, 87 S.Ct. at 1936-37).

While this was said in a case where there had in fact been a lineup (the issue being the absence of counsel at the lineup), the Court was condemning the consignment of the defendant to the very sort of hearing to which the District Court here consigned the appellant as his sole protection (e.g., see Sera-Leyva v. United States, _____ U.S. App. D.C._____, 453 F.2d 534 (1969), where this Court ruled that "defense counsel could also have explored what reason, if any, existed for failure to hold a lineup.")

In the circumstances of this case, the denial of appellant's pretrial Motion For A Lineup was error which deprived him of his right to a fair trial under due process of law as required by the Fifth Amendment.

TRANSCRIPT REFERENCES FOR ARGUMENT III

The Court's attention is respectfully directed to the following pages of the transcript:

Tr. 212-213

Pretrial Hearing, Tr. 2-3

In addition, the transcript references for Arguments I and II are relevant to Argument III, since Argument III depends on this Court concluding that either Argument I or Argument II is valid.

III. FAILURE TO EXCLUDE MRS. MILLARD'S TESTIMONY OR TO GRANT APPELLANT'S MOTION FOR A PRETRIAL LINEUP WAS NOT "HARMLESS ERROR."

In such cases as Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) and Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969), the Supreme Court has established the standard for determining when the action of a court in admitting tainted testimony requires a new trial. As that Court stated in Chapman:

> "We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Id., at 86-87, 84 S.Ct. at 230. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment" (386 U.S. at 23-24, 87 S.Ct. at 827-28).

The facts in this case make it crystal clear that the testimony of Mrs. Millard was very significant to the conviction in this case. There was no evidence which connected appellant with the crimes except for the cral identification testimony. There were two store employees who witnessed the first robbery and two who witnessed the second. Of the two who witnessed the first robbery (Mrs. Ethridge and Mrs. Body), Mrs. Ethridge did not identify appellant as the robber and only Mrs. Body did; of the two who witnessed the second robbery (Mrs. Ethridge and Mrs. Millard), Mrs. Ethridge did not identify appellant as the robber, and only Mrs. Millard did.

There can be no valid argument that as to the conviction of committing the second robbery, Mrs. Millard's testimony was very material, and its admission was not "harmless error."

But even as to the first robbery, it is clear that Mrs. Millard's testimony was material. The Government used her testimony, together with Mrs. Ethridge's testimony that the same person committed both robberies, as part of its case to prove that appellant committed the first robbery as well as the second (e.g., see Government's

closing argument to the jury, Tr. 212).* Otherwise, it was Mrs. Body's testimony against Mrs. Ethridge's (and appellant's) -- one store employee who saw the robber once against another store employee who saw the robber twice. Obviously, Mrs. Millard's testimony would have been material to the decision by the jurors as to which of these two was correct.

The standard to be followed here was set forth by the Supreme Court in Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963):

> "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

Certainly, it cannot be concluded that the jury disregarded Mrs. Millard's testimony in considering whether appellant was the person who committed the first robbery as well as the second.

The denial of appellant's Motion For A Lineup, too, was not "harmless error." Particularly in a case of this sort, where there are substantial questions as to the ability of the complaining

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* The appellant moved in the District Court for a severance of the trials on each of the counts, on the ground the evidence would be cumulative and would be used in much the manner that occurred. That motion was opposed by the Government and denied by the District Court (Pretrial Hearing, Tr. 2-3).

witnesses to identify the person accused, and where there has been a suggestive confrontation, the person accused should have the constitutional right, as part of his right to a fair trial, to request and receive a properly-conducted lineup if he wishes it.

It is particularly significant in this case that Mrs. Ethridge, who saw the robber twice, did view appellant in a lineup and failed to identify him as the robber. Perhaps the same would have been true of Mrs. Millard and Mrs. Body -- but the Government and the District Court denied appellant the right to find out the answer to that question. Certainly it cannot be said that the denial of this right was "harmless" when it was their testimony, and only their testimony, which was the basis for his conviction.

CONCLUSION

For the reasons set forth above, the conviction of appellant on both counts of robbery should be reversed.

Respectfully submitted,

HOWARD MONDERER
1800 K Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

June 1, 1971

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Brief for Appellant" has been sent by first class, United States mail, postage prepaid to the United States Attorney, U. S. Court House, 3d Street and John Marshall Place, N. W., Washington, D. C., this 1st day of June, 1971.

Howard Monderer

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1059

UNITED STATES OF AMERICA, APPELLEE

v.

GARY E. CALDWELL, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
RICHARD L. CYS,
Assistant United States Attorneys.

Cr. No. 717-70

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether an independent basis existed for Mrs. Millard's in-court identification of appellant where she clearly observed him at the time of the offense and had observed him on occasions prior to the offense?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1059

UNITED STATES OF AMERICA, APPELLEE

v.

GARY E. CALDWELL, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed April 28, 1970 appellant was charged with two counts of robbery (22 D.C. Code § 2901). At a pretrial hearing on May 26, 1970, appellant made a motion for severance of the two counts, which was denied by Judge Howard F. Corcoran. On July 6 Judge Corcoran held a hearing on and denied appellant's motion to compel the staging of a lineup. On July 13 Judge Corcoran conducted a hearing on appellant's motion to suppress identifications by two witnesses on March 18, 1970, two months after the crimes,

and any in-court identifications by them. Judge Corcoran granted the motion to suppress evidence of the March 18 identification by one witness but found a sufficient independent basis for her in-court identification to allow its admission. Immediately thereafter a jury trial commenced before Judge Corcoran, and in due course appellant was found guilty on both counts on July 14. On January 6, 1971, appellant was sentenced to six months to five years on each count, to run concurrently. This appeal followed.

The Identification Hearing

On January 22, 1970, Paulette Yvonne Millard and Sarah Ethridge,[1] employees of High's Dairy at 1548 First Street, S.W., were on duty at approximately 8:30 p.m. when a man (later identified by Mrs. Millard as appellant) entered the store. Without standing in line, appellant approached the cash register and asked to have everything put into a brown bag. He was holding his hand in his pocket as if he had a gun (Tr. 5-7, 10, 14-15). Mrs. Millard testified that her attention was attracted to appellant because the ties to the hood of his jacket were fastened "in his mouth" and because he failed to stand in line like the other customers (Tr. 14). Mrs. Millard heard appellant's command but ignored him. Appellant then said, "You think I'm kidding" (Tr. 7). When Mrs. Millard still did not respond, Mrs. Ethridge approached the cash register from the point where she had been standing and filled the bag with money.[2] Appellant then fled, pursued for a short distance by Mrs. Millard (Tr. 7). The encounter in the store lasted five minutes, during which time Mrs. Millard closely ob-

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[1] Mrs. Ethridge did not testify at the pre-trial hearing since she was unable to identify appellant at a lineup on March 24, 1970. Mrs. Millard did not attend that lineup, however, nor did the other witness, Mrs. Mary Ann Body (Tr. 143).

[2] At trial Mrs. Millard testified that Mrs. Ethridge was shaking and dropping the money on the floor. She stated that during this interval she "kept [her] eyes on him" and "looked at everything he had on" (Tr. 76, 86).

served appellant's face from a distance of two feet under good lighting conditions (Tr. 8-9, 14-16). When the police arrived, Mrs. Millard described the robber as twenty-eight years old, 5'4" tall, 155 pounds, having a mustache and a scar under his eye,[3] and wearing a green army jacket with a hood and brown corduroy pants (Tr. 8, 13-14, 16, 27).

On February 2, 1970, Mary Ann Body was working at the same High's store with Sarah Ethridge (Tr. 28-29). Between 8:00 and 9:00 p.m. Mrs. Body came from the back room and saw Sarah Ethridge placing money in a bag for a man whom she identified as appellant (Tr. 29, 34-36). Mrs. Body came to the counter where appellant was standing (Tr. 30, 36). She observed him from a distance of two or three feet for five minutes under good lighting conditions (Tr. 30-31, 36-37), and as he left Mrs. Body went to the window and looked after him (Tr. 29). She described his as 5'4" tall, 140 or 150 pounds, wearing an Army jacket with the hood tied so that his face was visible, and having a scar under his right eye and a "hairy face" (Tr. 30-31, 37-38).

On March 18, 1970, both Mrs. Body and Mrs. Millard, but not Mrs. Ethridge, were working in the store (Tr. 9, 17, 20, 31, 39). At about 8:00 p.m., while Mrs. Millard was at dinner, Mrs. Body saw appellant enter the store and eventually buy some soap powder (Tr. 9, 32). At that time Officers Andrew J. Micklus, Elizabeth Ann Hines and an Officer Clinton were on a stakeout in civilian clothes at the store (Tr. 44). Mrs. Body informed Officer Hines[4] that appellant, who had just left, was the person who had robbed the store in February

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[3] Mrs. Millard first stated on direct and cross-examination that the scar was under appellant's left eye (Tr. 8, 16). However, on subsequent cross-examination she recalled that the scar was under his right eye (Tr. 27). Her testimony at trial was consistent with her last recollection at the hearing (Tr. 79, 81).

[4] At trial the testimony showed that Officer Hines was the only officer in the store at this time (Tr. 101).

(Tr. 32). Appellant returned to the store again[5] and had a conversation with Officer Micklus about his position in the customer line (Tr. 32, 45). When appellant left again, Mrs. Body informed Officer Hines in the presence of Officer Micklus that appellant was the robber (Tr. 32, 45). These two officers, along with Officer Clinton, then located appellant in the laundromat next to the High's store (Tr. 45-46). After the officers asked the men in the laundromat to remain still, Officer Hines was dispatched to escort Mrs. Body to the laundromat (Tr. 46). Appellant was not separated from the men in the group (Tr. 33, 46).[6]

Before Officer Hines reached the store, Mrs. Millard returned from dinner and was told by Mrs. Body that the police were looking for appellant (Tr. 9, 17-18). Mrs. Body then went with Officer Hines to the laundromat, where she identified appellant from among a group of people (Tr. 32-33, 38-39, 46).[7] Officer Micklus recognized appellant as the person with whom he had had the previous conversation in the store (Tr. 46). Mrs. Body particularly remembered the scar under his right eye (Tr. 33, 47).

Immediately thereafter the officers and Mrs. Body returned with appellant in handcuffs to the High's store (Tr. 20, 47). In reply to Officer Micklus' inquiry, Mrs. Millard identified appellant as the person who had robbed the store on January 22 (Tr. 9, 19, 54). While the three officers and two witnesses were in the store, appellant's brother came in. Upon seeing him, Mrs. Body stated that she was not certain that appellant was the person who robbed the store. After closer inspection of appellant, however, she reaffirmed that he was the culprit because of his scar (Tr. 40-41, 51-52).[8] Mrs. Mil-

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[5] Mrs. Body testified at trial that the interval between visits was about fifteen or twenty minutes (Tr. 102).

[6] At trial Officer Micklus made this fact more clear (Tr. 203).

[7] See note 13, *infra*.

[8] The facts of this conversation were elicited clearly at trial (Tr. 110, 200-201).

lard did not become confused and was able to distinguish appellant from his brother (Tr. 20-22, 36).[9] She had in fact seen appellant on several occasions prior to the robbery, whereas Mrs. Body had not (Tr. 22, 36).[10]

After appellant's arrest both Mrs. Body and Mrs. Millard were shown photographs separately but did not attend a lineup (Tr. 23-27, 41-43).[11]

Appellant, testifying in his own behalf, stated that he was arrested in the lanundromat and returned to the High's store (Tr. 58). While he was in custody in High's, his brother entered the store; Mrs. Body then recanted her identification, and the officer released his handcuffs with an apology. Then Mrs. Body changed her mind again (Tr. 59). Accordingly to appellant's testimony, Mrs. Body asked Mrs. Millard twice if he was the robber, and finally Mrs. Millard identified him without ever having looked at him (Tr. 60).

The trial judge excluded any testimony concerning Mrs. Millard's identification on March 18 at the High's store. However, he found a sufficient independent basis to allow an in-court identification by Mrs. Millard based on the January 22 robbery (Tr. 64-67).

The Trial

At trial Mrs. Millard, Mrs. Body and Officer Micklus testified during the government's case in substantially the same manner as at the hearing on the motion to suppress (Tr. 73-113, 134-140). Additionally the evidence showed that $30.00 was taken by appellant on January 22, 1970, and $25.00 on February 2, 1970 (Tr. 77, 97, 115, 119). Mrs. Body testified that she could distinguish appellant from his brother (Tr. 110-111).

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[9] The trial testimony more fully elaborated this last fact (Tr. 84-85, 92-93).

[10] Again the trial tesitmony is more detailed (Tr. 81, 83-84, 105).

[11] Defense counsel waived any challenge concerning the photographic identification (Tr. 56-57).

Mrs. Ethridge corroborated the testimony of Mrs. Millard and Mrs. Body as to the crimes of January 22 and February 2 (Tr. 113-129). Additionally, she remembered her description of the robber on each occasion as being that he wore a green Army jacket with a hood, that his right eye was swollen with a cut on the eyelid, that he was 5′4″ or 5′5″ tall and that he weighed 145 to 150 pounds (Tr. 115-117, 120). She stated that the same man committed the offenses on both occasions, although she could not make a positive identification of appellant at a lineup on March 24, 1970 (Tr. 118, 123, 126-127, 143).

Officer Hines corroborated Officer Micklus' version of the events of March 18, 1970 (Tr. 130-134).

Anne Caldwell, appellant's mother, testified as a defense witness that appellant owned a jacket, marked as defense exhibit No. 1, which had no hood[12] (Tr. 150-151). She testified further that she was unaware of the location of her son's employment and that she could not recall his whereabouts on January 22 and February 2, 1970 (Tr. 153-154). She stated her son had a mustache during January and February of 1970 (Tr. 152).

Appellant again testified in his own behalf. He did not specifically remember his activities on January 22 or February 2, 1970 (Tr. 178, 187). His normal routine during those months was to work until 6:00 p.m., to go home, to eat and to retire (Tr. 187-188). His account of the happenings of March 18 matched substantially his testimony during the suppression hearing, although he added that he was not in a group of people when Mrs. Body identified him at the laundromat[13] (Tr. 179-182, 191). He identified defense exhibit No. 1 as his coat (Tr. 179). He denied committing either offense (Tr. 188-189). Additionally he testified that he received his

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[12] This jacket was exhibited to Mrs. Millard, Mrs. Body and Mrs. Ethridge during their cross-examinations (Tr. 89, 108, 123).

[13] Officer Micklus and Mrs. Body, however, both agreed that appellant was among other persons (Tr. 202-203, 205).

scar in a fight about two years before trial[14] and that his eye was not swollen during January of 1970 (Tr. 184, 192). At one point during the direct examination of appellant, he and his brother stood together about two feet from the jury (Tr. 185-187).

Officer Micklus as a defense witness and Mrs. Body as a rebuttal witness reiterated the facts concerning Mrs. Body's hesitation on March 18 (Tr. 200-201, 206-208).

ARGUMENT

An independent basis existed for Mrs. Millard's in-court identification.

(Tr. 7-10, 13-22, 27, 30-47, 51, 54, 62, 64-66, 74, 76, 78-86, 92-93, 96-97, 105-106, 115-118, 124-127, 152-153, 183-187, 200)

Appellant contends that the trial judge committed reversible error in allowing Paulette Millard to make an in-court identification of appellant as the person who robbed the High's store on January 22, 1970. This contention is without merit in light of the record, which amply supports the trial judge's conclusion that clear and convincing evidence[15] of an independent basis existed.[16] The testimony presented both at the suppression hearing and at the trial[17] satisfy the requirements of

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[14] Officer Micklus and Mrs. Body testified that they heard appellant state that the mark had been present on his face for a number of years, possibly since childhood (Tr. 201, 203-204, 206-207).

[15] *See United States* v. *Wade*, 388 U.S. 218, 240 (1967); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969).

[16] Although the trial judge ruled that the confrontation between Mrs. Millard and appellant on March 18 was unduly suggestive, he nevertheless allowed her to make an in-court identification, no doubt in reliance on the rationale of *Clemons* v. *United States*, *supra* note 16, 133 U.S. App. D.C. at 34, 408 F.2d at 1237 (Tr. 64-66).

[17] This Court may consider the testimony at both the motion hearing and the trial in ruling on the existence of an independent

an independent source.[18]

Mrs. Millard had an excellent opportunity to observe appellant during the incident on January 22, 1970. From the time appellant entered the store until he departed, Mrs. Ethridge watched him almost continuously, her attention first attracted by the strings of a hood tied in front of appellant's mouth and his failure to take a place in line with other customers, and retained by his asking for money with his hand in his pocket as if holding a gun (Tr. 14-15). During the five-minute encounter Mrs. Millard observed appellant's full face from as close as two feet under good lighting conditions (Tr. 8-9, 15, 78-79, 81, 92). After Mrs. Ethridge interceded, Mrs. Millard was even more receptive to her observations of appellant, having ceased to be the primary object of appellant's attention (Tr. 7, 76-77, 93). She in fact watched appellant very closely as Mrs. Ethridge placed the money into a bag and also pursued appellant a short distance after his departure (Tr. 76, 86). The quality of her observation is further reflected by her detailed description given to the police, including his age, height, weight, type and color of clothing and the presence of a mustache and scar[19] (Tr. 8, 13-14, 16, 27, 74). This

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source. *United States* v. *Kemper*, 140 U.S. App. D.C. 47, 50 n.24, 433 F.2d 1153, 1156 n.24 (1970); *Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969).

[18] *Simmons* v. *United States*, 390 U.S. 377, 385 (1968); *United States* v. *Wade*, *supra* note 15, 388 U.S. at 241; *United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 19, 1971, slip op. at 7; *United States* v. *Kemper*, *supra* note 17, 140 U.S. App. D.C. at 50-52, 433 F.2d at 1156-1158; *United States* v. *Terry*, 137 U.S. App. D.C. 267, 272-273, 422 F.2d 704, 709-710 (1970); *Long* v. *United States*, 137 U.S. App. D.C. 311, 315-316, 424 F.2d 799, 803-804 (1969); *Hawkins* v. *United States*, *supra* note 17; *Gregory* v. *United States*, 133 U.S. App. D.C. 317, 324-325, 410 F.2d 1016, 1023-1024, *cert. denied*, 396 U.S. 865 (1969); *Clemons* v. *United States*, *supra* note 15, 133 U.S. App. D.C. at 38, 43, 47, 408 F.2d at 1241, 1246, 1250.

[19] Some confusion existed in Mrs. Millard's testimony as to the location of the scar. See note 3, *supra*. Appellee submits that the witness' initial confusion is of little consequence. *Cf. United States* v. *Kemper*, *supra* note 17.

description apparently matched appellant's physical characteristics (Tr. 62, 105, 152-153, 183). Further corroboration of the description was supplied through the testimony of Mrs. Ethridge, who was also an eyewitness; Mrs. Body, who observed appellant while he perpetrated the second robbery; and the jurors' close view of appellant as he stood before them at defense counsel's direction (Tr. 30-31, 37-38, 96-97, 105-106, 115-117, 124-126, 185-187). Mrs. Millard steadfastly maintained her positive identification despite rigorous cross-examination (Tr. 14-16, 84). Mrs. Millard had seen appellant in the store on other occasions prior to the date of the robbery (Tr. 22, 81, 83-84).[20]

These circumstances compel the conclusion that Mrs. Millard relied upon her impressions formed on January 22, 1970, when subsequently identifying appellant on March 18 and at trial. This Court has repeatedly recognized the heavy burden imposed upon appellant in seeking to disturb a trial court's finding that an identification is founded upon an independent basis.[21] The trial

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[20] This fact, more than any other, adequately balances the suggestiveness of the conforntation occurring on March 18, two months after the crime. *United States* v. *Wade*, *supra* note 15, 388 U.S. at 241 n.33; *Gregory* v. *United States*, *supra* note 18, 133 U.S. App. D.C. at 324, 410 F.2d at 1241. *Compare Long* v. *United States*, *supra* note 18, 137 U.S. App. D.C. at 316, 424 F.2d at 804.

Appellant argues that the clear view of him by Mrs. Millard, the sufficiency of the description and the fact of Mrs. Millard's prior observations are overshadowed by the omission in her description of the fact she had seen him prior to the robbery. That fact did not, however, constitute part of a description, and, as she explained, she had seen him in the store but did not know where he lived (Tr. 22). Moreover, the omission of even relevant details in descriptions is not an indication of a witness' lack of candor at trial. *United States* v. *Kemper*, *supra* note 17, 140 U.S. App. D.C. at 51 n.31, 433 F.2d at 1157 n.31.

[21] *E.g.*, *United States* v. *Hinkle*, D.C. Cir. No. 24273, decided July 19, 1971, slip op. at 4, and authorities cited therein; see *United States* v. *Kemper*, *supra* note 17, 140 U.S. App. D.C. at 52, 433 F.2d at 1158.

Appellant attempts to meet this burden primarily by relying on the suggestiveness of the March 18 confrontation but omits almost

court's finding must stand particularly in light of the testimony of the other witnesses establishing appellant's guilt. Mrs. Body's positive spontaneous identification of appellant on March 18 as the man who robbed her on February 2, her view of him on February 2, and Mrs. Ethridge's testimony that the same person committed the crimes on January 22 and February 2 leave little doubt of appellant's culpability (Tr. 32-33, 38-39, 45-47, 118, 126-127). The record as a whole presents no likelihood at all of irreparable misidentification. *See United States* v. *Miller*, *supra* note 18, slip. op. at 7; *United States* v.

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entirely any consideration of the January 22 robbery. Moreover, Mrs. Millard was unswerving in her identification during the March 18 confrontation, unlike Mrs. Body, and she testified that she remembered appellant at that time because of his physical and facial characteristics and that she was able to distinguish appellant from his brother (Tr. 9-10, 18-22, 40-41, 51, 54 ,200). The degree of independence and discernment exhibited by Mrs. Millard on March 18 demonstrates that even then she was relying upon her impressions of appellant obtained and retained at the January 22 robbery.

Cases cited by appellant support in large measure the government's position that additional factors of reliability, such as other observations of an accused prior to the offense, will aid a witness' clear observation at the time of the offense in overcoming even a highly suggestive confrontaiton. *Gregory* v. *United States*, *supra* note 18, 133 U.S. App. D.C. at 323-324, 410 F.2d at 1022-1023; *Clemons* v. *United States*, *supra* note 15, 133 U.S. App. D.C. at 38, 47, 408 F.2d at 1241, 1250; *see United States* v. *Green*, 141 U.S. App. D.C. 136, 138, 436 F.2d 290, 292 (1970); *Frazier* v. *United States*, 136 U.S. App. D.C. 180, 419 F.2d 1161 (1969); *cf. Coleman* v. *Alabama*, 399 U.S. 1 (1970); *United States* v. *Harris*, 141 U.S. App. D.C. 253, 437 F.2d 686 (1970).

Cases cited by appellant where an independent source was not found can be distinguished. In *Long* v. *United States*, *supra* note 18, the witness had only a fleeting glance of the villain, and no "extraneous circumstances" such as prior acquaintance were present. 137 U.S. App. D.C. at 316, 424 F.2d at 804. In *Mason* v. *United States*, 134 U.S. App. D.C. 280, 414 F.2d 1176 (1969), the witness expressed difficulty in separating the images of two suggestive encounters from that formed at the time of the offense, unlike Mrs. Millard in the instant case. Appellant's other cases do not focus on an evaluation of the record to determine the existence of an independent source. *E.g.*, *United States* v. *Evans*, 141 U.S. App. D.C. 321, 438 F.2d 162 (1970); *United States* v. *Wilson*, 140 U.S. App. D.C. 331, 435 F.2d 403 (1970).

Harris, *supra* note 22, 141 U.S. App. D.C. at 256, 437 F.2d at 689 (1970); *Mendoza-Acosta* v. *United States*, 139 U.S. App. D.C. 143, 146, 430 F.2d 516, 519 (1970); *Long* v. *United States*, *supra* note 19, 137 U.S. App. D.C. at 316-317, 424 F.2d at 804-805; *Clemons* v. *United States*, *supra* note 15, 133 U.S. App. D.C. at 47, 408 F.2d at 1250.[22]

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[22] Appellant also contends that the court's refusal to compel the staging of a lineup deprived him of due process. The law is otherwise. *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 91 n.11, 420 F.2d 1292, 1294 n.11 (1969); *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 295, 353 F.2d 462, 466 (1965); *Haskins* v. *United States*, 433 F.2d 836, 838 (10th Cir. 1970); *United States* v. *Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *United States* v. *Munroe*, 421 F.2d 644, 645 (5th Cir.), *cert. denied*, 400 U.S. 851 (1970).

In extraordinary situations trial courts have themselves ordered lineups conducted *in the courtroom* to test the reliability of otherwise questionable identifications. *E.g.*, *United States* v. *Hinkle*, *supra* note 21, slip op. at 4-5; *United States* v. *McNair*, 140 U.S. App. D.C. 26, 433 F.2d 1132 (1970). In the absence of exceptional circumstances, however, the law is clear that a defendant's *Wade-Stovall* rights are sufficiently protected by judicial review of the manner in which an out-of-court confrontation is conducted by the executive. Such review is normally obtained, as it was in this case, by way of a hearing to determine the admissibility of identification testimony. With judicial review of actual confrontations readily available, and the extraordinary remedy of an in-court lineup *conducted by the court* (not by the executive) also available for truly extraordinary cases, judicial encroachment into the discretionary function vested in the executive of scheduling lineups as investigatory procedures is unnecessary and unwarranted. *See Williams* v. *United States*, 136 U.S. App. D.C. 158, 161, 419 F.2d 740, 743 (1969) (*en banc*); *cf. Kennedy* v. *United States*, *supra*, 122 U.S. App. D.C. at 295, 353 F.2d at 466; Metropolitan Police Department Memorandum Order No. 16, series 1970, ¶ III (May 15, 1970). Particularly in light of the whole record in this case, we submit that appellant's rights were adequately protected.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1059

GARY E. CALDWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from Judgment of Conviction in the United States District Court for the District of Columbia

---

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Attorney for Appellant
(Appointed by this Court)

October 4, 1971

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* Cases principally relied upon.

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GARY E. CALDWELL, APPELLANT

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REPLY BRIEF FOR APPELLANT

ARGUMENT

I.

BECAUSE OF THE OVERLY-SUGGESTIVE AND UNJUSTIFIED PRE-TRIAL "ONE MAN SHOW-UP", THE IN-COURT IDENTIFICATION OF APPELLANT BY MRS. MILLARD, THE DAUGHTER, SHOULD HAVE BEEN EXCLUDED.

The Government Brief does not contest the material facts of the clearly suggestive and completely unjustified confrontation in which the appellant, in handcuffs and under the armed guard of three police officers, was taken from the laundromat where he was arrested and identified by the mother, Mrs. Body, and, instead of being taken

to the police station to be booked, was brought to the High's store where he was exhibited to the daughter, Mrs. Millard, who was informed that her own mother* -- who was also present at the confrontation -- had identified him as the robber and that the police had arrested him for the crimes. Nor does the Government Brief attempt to deny that the confrontation was both illegally suggestive and completely unjustified.

The cases are clear that in cases of suggestive confrontations of this kind, the burden is on the Government

> "to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [suggestive] identification" United States v. Wade, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939 (1967); Long v. United States, 137 U.S. App. D.C. 311, 315, 424 F.2d 799, 803 (1969).

Furthermore, while the conclusions of the trial court are entitled to great respect, when a constitutional issue is involved this Court's own view of the entire record permits it to re-evaluate whether the Government has sufficiently sustained its great burden so as to require reversal. As this Court stated in this connection in United States v. Gambrill, No. 23,512, decided by this Court July 29,

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* It is interesting to note that nowhere in the entire Government Brief is it mentioned that Mrs. Body is Mrs. Millard's mother or that Mrs. Millard is Mrs. Body's daughter -- a most significant fact.

1971:

> "However well established these principles may be, they cannot derogate from the equally well-established principle that, when a constitutional issue is present, our own view of the entire record may impel us to conclude that the evidence concerning the existence of an independent source is insufficient to satisfy the burden which rests upon the Government. This is one such case, for we are unable to conclude in the circumstances here present that the identification procedures which were used with respect to both accused were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (slip opinion, p. 17, citations omitted and emphasis added).

The Government did not satisfy its burden in this case, and Mrs. Millard's in-court identification should have been excluded. That "Mrs. Millard had an excellent opportunity to observe [the robber] during the incident on January 22, 1970," the point on which the Government lays the greatest stress (Government Brief, p. 8) is of not sufficient significance when weighed against the other facts that show that Mrs. Millard did not have a sufficiently accurate prior mental picture of what the robber looked like to enable her memory to transcend the illegally suggestive confrontation*

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* The holding of the confrontation clearly violates the Police Department's own regulation regarding near-scene or on-scene identification confrontations, which allow them only if the suspect is arrested within 60 minutes of an alleged offense. See Memorandum Order No. 16, Series 1970, par. I-1 (May 15, 1970), cited in the

(Cont'd next page)

which occurred about two months later.* These other significant facts include Mrs. Millard's failure to tell the police after the robbery that she knew the robber as a customer in the store prior to the robbery -- probably the most significant fact she could tell them to aid their search for the robber (Tr. 22-23, 81, 83-84); the testimony of Mrs. Body and Mrs. Ethridge, both of whom worked at the store most of the time, that the robber had not been a customer at

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(Cont'd from preceding page)

Government's Brief herein and discussed by this Court in United States v. Perry, No. 22,469, decided by this Court on June 1, 1971, slip opinion, p. 21, emphasis added. Only where the suspect is in "critical" condition are confrontations permitted beyond the 60-minute limit (par. I-3). Here, the suggestive and unjustified confrontation was held by the police about two months after the crime.

Furthermore, the Police Department's own regulation regarding such confrontations requires that "to the extent practicable each witness shall view the subject independently, out of the immediate presence of the other witnesses" (Memorandum Order No. 16, Series 1970, par. I-8 (May 15, 1970)). This part of the regulation, too, was violated here, without any necessity or justification.

* Only recently, this Court, in its en banc ruling in United States v. Thomas, No. 22,768, decided September 14, 1971, noted the "serious problem as to whether any new in-court identification of appellant by Drayton could survive a one-man show-up at which appellant, without counsel and 24 hours after the offenses were committed, was first identified as a participant" (slip opinion, p. 18, emphasis added).

the store and they had never seen him before* (Appellant's Brief, pp. 7-8); and Mrs. Millard's confusion as to which eye had the scar (Appellant's Brief, p. 12 fn).

The decisions of the Supreme Court and of this Court make it clear that where there are discrepancies of this kind, particularly where coupled with as suggestive and unjustified a confrontation as occurred here six to eight weeks after the crimes, the in-court identification must be excluded. E.g. see United States v. Wade, 388 U.S. 218, 241, 87 S.Ct. 1926, 1940 (1967); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. den. 394 U.S. 964 (1969); Gregory v. United States, No. 21,089, decided by this Court March 18, 1969; Long v. United States, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969); United States v. Perry, No. 22,469, decided by this Court June 1, 1961.

Nor does the record as a whole present "no likelihood at all of irreparable misidentification" (Government Brief, p. 10) On the contrary, there is no extrinsic evidence whatsoever that appellant committed either robbery. The sole evidence against

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* There is no dispute that appellant was a customer of the store, as indeed he was on two occasions on the night he was arrested (Tr. 22-23, 81, 83-84; 32, 45, 101-104, 136).

appellant was the identification testimony of Mrs. Millard as to the January 22, 1970, robbery and of Mrs. Body as to the February 2, 1970, robbery (and even Mrs. Body was confused by the chance appearance of appellant's brother on the night of the arrest (Tr. 109-110, 200-201, 206-208)). The only eye-witness to both robberies and the person closest to the robber on both occasions, Mrs. Ethridge, failed to identify appellant as the robber (Tr. 123, 127, 143-144). There was evidence that appellant was not in need of money, being an auto mechanic who worked regularly, earning from $100 to $350 per week (Tr. 164-167, 171, 176-177). Appellant owned an army-type jacket which at first glance looked like the robber's, but all the complaining witnesses agreed it was not the one worn by the robber (Tr. 89-90 (testimony of Mrs. Millard); 108 (testimony of Mrs. Body); 123-124 (testimony of Mrs. Ethridge); 150-151, 180, 183)). And it is inherently incredible that a person like appellant,* who was a customer of the store and therefore readily identifiable, would have committed the two robberies without any disguise or mask and with his face exposed and readily recognizable, and then have continued thereafter to patronize the same store as a customer,

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* Furthermore, appellant had no prior criminal record, and testified below in his own defense. Character witnesses testified to his excellent reputation for truth, honesty and veracity (Tr. 168-169, 172-173).

as he did on the night of his arrest (Tr. 6-9, 12-15, 22-23, 29-32, 37, 45-46, 74-79, 81, 83-84, 95-97, 101-104, 112, 114-116, 117-120, 121, 136, 138-139, 177-178, 194-195; and appellant's testimony, Tr. 180-181).

II.

THE APPELLANT'S PRE-TRIAL MOTION FOR A LINEUP SHOULD HAVE BEEN GRANTED.

The second principal issue in this case is whether, on the facts of this case, appellant's affirmative motion to the District Court to order a pre-trial lineup so the Court could have some more objective idea of whether the two complaining witnesses could identify him as the robber, should have been granted.

The Government attempts to dismiss this issue in a footnote (Government Brief, p. 11 fn 22), basically with the claim that "the law is otherwise," followed by citations to several cases. However, far from being a settled question so easily dismissible without discussion, only last year, in one of the cases cited by the Government, the Second Circuit stated that the question of whether the defense was entitled to a lineup "does not appear to have been presented heretofore." United States v. Ravich, 421 F.2d 1196, 1202-3 (1970); see also United States v. McNair, 140 U.S. App. D.C. 26, 28, 433 F.2d 1132, 1134 (1970), where this Court expressly reserved this question.

Unlike this case, in Ravich there was no finding that improper methods of pre-trial identification had been used, and in such circumstances the Second Circuit stated it was not disposed to conclude that the denial of a lineup violated a constitutional right. However, the Court added the following statement:

> "On the other hand, we can well see how a prompt line-up might be of value both to an innocent accused and to law enforcement officers. A pretrial request by a defendant for a line-up is thus addressed to the sound discretion of the district court and should be carefully considered. Without any attempt at being exhaustive, we think some relevant factors are the length of time between the crime or arrest and the request, the possibility that the defendant may have altered his appearance (as was at least attempted here), the extent of inconvenience to prosecution witnesses, the possibility that revealing the identity of the prosecution witnesses will subject them to intimidation, the propriety of other identification procedures used by the prosecution, and the degree of doubt concerning the identification" (421 F.2d at 1203).

In this case, the District Court made no attempt to inquire into any of these factors. It would appear from the record, however, that here appellant had not altered his appearance except to get a haircut (the robber's hair was covered by the hood anyway) (Tr. 186); there was no question relating to revealing the identity of the witnesses; there was substantial question concerning the propriety of the other identification procedures used by the Government; and there was substantial doubt concerning the identification -- all of which militated in favor of the grant of appellant's request for a lineup.

Had the District Court given appropriate consideration to these factors, it should have granted appellant's pre-trial motion, even without considering the constitutional question.

In another case cited in the Government Brief, United States v. Hamilton, 137 U.S. App. D.C. 89, 91 n. 11, 420 F.2d 1292, 1294 n. 11 (1969), this Court indicated there was merit in the suggestion that a lineup be required as a condition to permitting an in-court identification after even a valid initial photographic identification. While this Court did not invoke the due process mandate or its supervisory power in that case, which did not involve a suggestive pre-trial confrontation, it also felt itself obliged to add, in the footnote ruling on the lineup question, that there was very extensive extrinsic evidence of guilt -- "so strong as to have warranted affirmance even if there had been an error in admitting the identification testimony."

Nor do the other cases cited by the Government support its contention that "the law is otherwise." In Haskins v. United States, 433 F.2d 836 (9 Cir. 1970), the defendant did not affirmatively request a pre-trial lineup, but merely contended on appeal that he should have been given one automatically as a basic right. In United States v. Munroe, 421 F.2d 644 (5 Cir. 1970), the request for a lineup was made during the trial and there was substantial extrinsic evidence connecting

the defendant to the crime. And Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965), a case decided before the Supreme Court's decision in Stovall v. Denno, 388 U.S. 377, 88 S.Ct. 967 (1968), simply refused to apply the Second Circuit's decision in Stovall to an identification at the scene of a crime; it does not appear that in Kennedy the defendant requested a pre-trial lineup, merely that he claimed he should have had a lineup instead of the allegedly suggestive confrontation.

The Government's secondary argument that scheduling lineups is a "discretionary function vested in the executive branch" has nothing to do with the lineup issue in this case (Government Brief, p. 11 fn 22). There is no question here of the District Court or the appellant attempting to interfere with a lineup being conducted by the Government. Rather, the issue is whether the other party to the case (the appellant) can assert a similar right to have a lineup conducted at his instance.*

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* In United States v. McNair, 140 U.S. App. D.C. 26, 433 F.2d 1132 (1970), a pretrial lineup was held at the defendant's request, under the supervision of the trial judge, with all the other lineup participants selected by defense counsel. During the trial in United States v. Hinkle, No. 24,273, decided by this Court July 19, 1971, the District Court held its own lineup. The Government apparently concedes that there was no "encroachment" on the functions of the police or the prosecutor in these actions.

The Government's argument here seems to be that the Government can appropriate the lineup process itself solely to its own use, and no one else should be permitted to initiate one except for trial courts, in the courtroom, in extraordinary situations. If the lineup identification process has any validity as an evidentiary tool for the prosecution, it cannot be permitted to be so entirely denied to the defense.

Appellant's pre-trial motion for a lineup should have been ordered by the District Court either as a matter of its sound discretion after inquiry into the relevant factors (United States v. Ravich, supra) or as a right which, on the facts of this case, invoked the due process mandate and the Court's supervisory power (United States v. Hamilton, supra). On the facts of this case, the District Court's refusal to do so, or even to inquire into and consider the relevant factors, was reversible error.

CONCLUSION

For the reasons set forth in the appellant's main and reply briefs herein, the conviction of appellant on both counts of robbery should be reversed.

Respectfully submitted,

HOWARD MONDERER
1800 K Street, N. W.
Washington, D. C. 20006

Monday, October 4, 1971

CERTIFICATE OF SERVICE

I, Howard Monderer, hereby certify that I have personally served a copy of the foregoing REPLY BRIEF FOR APPELLANT upon the United States Attorney, U. S. Court House, 3d St. and John Marshall Place, N. W., Washington, D. C. this 4th day of October, 1971.

Howard Monderer